86-184

No.

Supreme Court, U.S.
FILED
JUL 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

PATRICK W. SIMMONS,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JULY 1986

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QUESTION PRESENTED*

Whether the court of appeals erred in holding that Congress in 1980 by amending the carrier consolidation provisions of 49 U.S.C. 11344, intended to have the I.C.C. henceforth exclude consideration of the impact on persons employed by rail carriers not parties to the transaction, but who nevertheless would be adversely affected thereby, in determining if the transaction is in the public interest.

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*The list of all parties is set forth in No. 85-2133, following the Questions Presented therein.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cross-petitioner, Patrick W. Simmons,[1] respectfully prays that a writ of certiorari issue to review the judgment and the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Sixth Circuit are reported at *Crounse Corp. v. I.C.C.*, 781 F.2d 1176 (1986) and 787 F.2d 1031.[2] The decision of the Interstate Commerce Commission is not yet reported.[3]

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[1]Illinois Legislative Director for United Transportation Union.

[2]The opinions of the Court of Appeals are reproduced in the petition for writ of certiorari in No. 85-2133, at 1a-41a and 44a-46a, respectively.

[3]The agency's decision is reproduced in petition for writ of certiorari in No. 85-2133, at 47a-210a.

JURISDICTION

The judgment of the Court of Appeals was entered January 23, 1986. Rehearing was denied March 28, 1986, as amended April 11, 1986.

This cross-petition for writ of certiorari is filed under Rule 19.5; the petition for writ of certiorari in No. 85-2133 was received June 27, 1986.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

The principal statute involved in this cross-petition for writ of certiorari is 49 U.S.C. 11344, and is set form below. The provisions prior to amendment in 1980 are set forth in the Addendum, *infra,* 1b.

§ 11344. Consolidation, merger, and acquisition of con trol: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the

Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase in consistent with the public interst. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

STATEMENT

This proceeding involves judicial review of the decision of the Interstate Commerce Commission ("I.C.C.") which approved acquisition of American Commercial Lines, Inc. ("ACL") by CSX Corporation ("CSX").

The I.C.C.'s approval was made under two statutes, section 11 of the Panama Canal Act of 1912, 49 U.S.C. 11321, and section 11344 of Title 49 U.S.C. (1982 ed. Supp. II).

The petition in No. 85-2133 focuses on the Panama Canal Act of 1912. On the other hand, this cross-petition is directed solely to the carrier consolidation provisions of 49 U.S.C. 11344, and, in particular, whether the I.C.C. is required to consider the interest of all rail employees (not just CSX rail employees) in determining whether to approve the CSX-ACL affiliation.

This cross-petition is not conditional. This cross-petition should be considered whether or not the Court grants certiorari in No. 85-2133.

The CSX-ACL affiliation is projected to divert some rail freight business from the lines of rail carriers not in the CSX family. The I.C.C.'s report gave examples of coal, grain, and phosphate/potash shipments, handled jointly by CSX rail lines and non-CSX rail lines, which may be diverted to CSX-ACL routes. (No. 85-2133, 57a-59a). However, the I.C.C. ruled that the effect of the CSX-ACL proposed transaction upon the employees of non-CSX carriers no longer could be considered in determining whether the transaction should be approved. The I.C.C. acknowledged that until recently it considered the impact of a transaction upon the employees of all carriers, including water carriers, in passing upon rail-water acquisitions. (No. 85-2133, 84a):

> In past decisions approving rail-water consolidations, the Commission has interpreted former section 5(2)(f) as applying only to railroad employees, but has considered the interest of other carrier employees under the public interest criteria applicable to consolidations and has concluded that it had discretionary authority to impose conditions for the benefit of those employees. *See Federal Barge Lines, Inc., Purchase,* 285 I.C.C 439, 447 (1953); *Baltimore Steam Packet Co. Acquisition and Control,* 244 I.C.C. 583, 603-4 (1941). The Commission based this analysis on the former generally applicable consolidation criteria that required consideration of the interest of carrier employees affected by the proposed transaction. Under those criteria, therefore, the Commission had an obligation to consider the impact of a transaction on water carrier employees."

The I.C.C. contended that Staggers Rail Act of 1980[4] eliminated consideration of employee impacts from the agency's decision process whether to approve a transaction, if the proceeding did not involve the merger or control of at least two Class 1 rail carriers. Prior to 1980, 49 U.S.C. 11344(c) provided one general standard for all carrier consolidations — "consistent with the public interest"— subject to additional requirements for rail-motor consolidations, but under subsection 11344(b) consideration had to be given to at least four named criteria, one being the impact on railroad employees. 49 U.S.C. 11344(a)-(c) (1976 ed. Supp. II).

Staggers Rail Act of 1980 added a fifth criterion to subsection 11344(b), but confined subsection 11344(b) to

[4]P.L. 96-448, section 228; 94 Stat. 1931-32 (1980).

proceedings involving the merger or control of at least two class 1 rail carriers. All other proceedings – which embrace CSX-ACL since two class 1 rail carriers are not deemed involved – are governed by a new subsection 11344(d), which requires the I.C.C. to approve an application unless it finds that (1) as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States, and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Thus, based upon its interpretation of the 1980 amendments to 49 U.S.C. 11344, the I.C.C. in passing upon the CSX-ACL transaction did not consider the impact upon employees of non-CSX rail carriers suffering a diversion of traffic from the CSX-ACL transaction. In short, the I.C.C. found the "consistent with the public interest" standard of subsection 11344(c) to be inapplicable, and found the "public interest" of subsection 11344(d) not to embrace employee impacts, even though the I.C.C. in its CSX-ACL decision made a public interest finding under subsection 11344(d). (No. 85-2133, 157a).

The I.C.C. did impose the mandatory employee protective conditions for employees under 49 U.S.C. 11347, but only for CSX rail employees. (No. 85-2133, 83a-84a, 149a, 149a-51a, 157a-58a).

Court of Appeals Opinion

The Court of Appeals sustained the I.C.C.'s rejection of employee concern coming within the "public interest," but on somewhat different grounds. The Court pointed to subsection 11344(b)'s requirement for the I.C.C. to con-

sider the impact on all carrier employees, but found the CSX-ACL transaction governed instead by subsection 11344(d), which requires only that the I.C.C. consider the public interest. The court of apeals stated that since subsection 11344(b) also requires consideration of the public interest, in addition to the effect on employees, Congress did not contemplate that the term "public interest" in subsection 11344(d) to include concern about effect on employees. 781 F.2d at 1192. (No. 85-2133, 24a):

> "Section 11344(b), however, is expressly restricted to mergers involving at least two class I railroads. *Detroit, Toledo & Ironton* involved such a merger. The instant case does not. The instant case is subject to the provisions of section 11344(d), covering mergers other than of class I railroads. Section 11344(d) does not contain a requirement similar to section 11344(b)'s requirement to consider the impact on all carrier employees. Section 11344(d) requires only that the Commission consider the public interest. Since section 11344(b) also specifically requires consideration of the public interest, in addition to consideration of the effect on employees, *we conclude that Congress did not contemplate that the general notion of "public interest" included the concern about effect on employees. [Emphasis supplied]*

The court of appeals added that two Supreme Court decisions do not support the view that "public interest" includes the interest of railroad employees not directly affected. 781 F.2d at 1192. (No. 85-2133, 25a):

> Simmons argues that *I.C.C. v. Railway Labor Association,* 315 U.S. 373 (1942), and *United States v. Lowden,* 308 US. 225 (1939), hold that, as a matter of law, the general term "public in-

> terest," in railroad transactions, includes the interest of railroad employees. We find that *Railway Labor* and *Lowden* are inapposite. Each case basically held that because the Commission had authority to impose conditions in furtherance of the public interest, it could impose restrictions designed to protect the employees of railroads directly involved in transactions requiring Commission approval. Neither case goes on to hold that "public interest" necessarily includes the interest of employees not directly affected. We hold that the Commission was not required to consider the interests of such employees in the instant transaction.

Cross-petitioner filed his separate petition for rehearing, which was deemed denied March 28, 1986, as amended April 11, 1986. 787 F.2d 1031. (No. 85-2133, 44a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

I. THE COURT OF APPEALS ERRED IN RULING THAT RAILROAD EMPLOYEES CANNOT BE CONSIDERED PART OF THE "PUBLIC INTEREST" UNDER 49 U.S.C. 11344(d).

The holding of the Court of Appeals that railroad employees are not within the "public interest" of subsection 11344(d) is not supported by statutory language or legislative history.

Contrary to the opinion of the Court of Appeals, it is subsection 11344(c) which contains the "public interest" standard governing I.C.C. consideration of proposals in-

volving the merger or control of at least two class 1 rail carriers. Subsection 11344(b) does not specifically require consideration of the "public interest" in addition to consideration of the effect on employees. The text of subsections 11344(b) and 11344(c) are quite clear in this regard. The only mention of "public interest" in 49 U.S.C. 11344(b)(1) is "the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction." Subsection 11344(b) does not set forth a general "public interest" standard. Rather, such public interest standard is specified in subsections 11344(c) and 11344(d).

When Congress in 1980 required that the five criteria of subsection 11344(b)(1) be considered by the I.C.C. in determining the public interest under subsection 11344(c), where merger or control of at least two class 1 railroads is involved, Congress could not be presumed to mean the I.C.C. should *exclude* any of the five criteria when determining the public interest under subsection 11344(d), involving transactions other than the merger or control or two class 1 railroads. The public interest under subsection 11344(d) does not explicitly *require* the I.C.C. to consider any specific named criteria under the public interest. The meaning of the term is obviously dependent upon the facts presented and the issues raised in particular proceedings.

There is nothing in the legislative history of Staggers Rail Act of 1980 to indicate that the I.C.C. no longer is to consider railroad employees as a factor in the "public interest" when the issue is properly raised. The Court of Appeals simply misread the statutory provisions, which are clear on their face.[5]

[5]The opinion of the Court of Appeals does recognize that the "public interest" of subsection 11344(d) is involved in the instant CSX-ACL transaction, and the I.C.C. did make a finding on this score. (No.

Congress in eliminating the requirement for the I.C.C. to consider the five specific criteria of subsection 11344(b)(1) in cases not involving the control or merger of at least two class 1 rail carriers, did not mean to exclude such criteria where appropriately raised under sub-section 11344(d). The aim of Congress was to expedite the processing of smaller transactions by the I.C.C.H. Rept. No. 96-1430 (Conf.), 120-21 (1980).

II. THE COURT OF APPEALS ERRED IN CONFINING THE PUBLIC INTEREST IN EMPLOYEE IMPACTS TO THOSE EMPLOYEES DIRECTLY AFFECTED.

The Court of Appeals erred in ruling the I.C.C. was not required to consider the impact of a transaction upon non-CSX employees, citing *I.C.C. v. Railway Labor Association,* 315 U.S. 373 (1942) and *United States v. Lowden,* 308 U.S. 225 (1939). In short, even if the transaction did involve two class 1 rail carriers, the Court of Appeals would find the I.C.C. is not required to consider the interest of non-CSX rail carrier employees under the public interest standard in approving the transaction. The ruling of the Court of Appeals is important in this subsection 11344(d) case, since it is the non-CSX rail carrier employees, not qualifying for the mandatory 49 U.S.C. 11347 employee protective conditions, whose interest has not been considered.

The decision would seem contrary to the Court of Appeals for the Fifth Circuit, wherein it was held the impact

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85-2133, 157a). In situations where the I.C.C. does not reach the public interest under subsection 11344(d), another court of appeals has taken more restrictive approach, with which this petition disagrees. *People of State of Ill.* v. *I.C.C.*, 687 F.2d 1047 (7th Cir. 1982).

on all rail carriers is to be considered as part of the broad public interest, in passing on the proposal, but that only the applicants' employees are granted protective conditions. *Missouri-Kansas-Texas R. Co. v. United States,* 632 F.2d 392, 411 (5th Cir. 1980), cert. den. 451 U.S. 1017:

> In the BN-Frisco opinion, the Commission considered the effect of the merger on all carrier employees as part of its broad view of the public interest under 11344(c). But only the employees of BN and Frisco were granted actual protection in the Commission's order.

Moreover, the Court of Appeals has not correctly understood the opinions of this Court in *I.C.C. v. Railway Labor Association supra,* and *United States v. Lowden, supra.* Certainly the impact of a rail transaction upon the employees of rail carriers not parties to the transaction, but suffering diversion of traffic, is part of the public interest to be considered by the I.C.C. in determining whether to approve the transaction. This Court recognized the role of employees in carrying out the national transportation policy, and in maintaining an adequate and efficient transportation system, in *United States v. Lowden,* 308 U.S. at 234:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

The Court added concerning transportation efficiency (*Id.* at 235-36):

> The now extensive history of legislation regulating the relations of railroad employees and employers plainly evidences the awareness of Congress that just and reasonable treatment of railroad employees is not only an essential aid to the maintenance of a service uninterrupted by labor disputes, bur that it promotes efficiency, which suffers through loss of employee morale when the demands of justice are ignored.

Clearly, the impact upon rail employees, direct or indirectly affected by the transaction, is a matter of the public interest and must be considered by the I.C.C. when appropriately raised in its proceedings under 49 U.S.C. 11344(d).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals in this case.

Respectfully submitted,

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ADDENDUM

FORMER 49 U.S.C. 11344

§11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commision may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with thepublic interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS CSX CORPORATION AND AMERICAN COMMERCIAL LINES, INC. IN OPPOSITION

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September 16, 1986

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34pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the Panama Canal Act authorizes the Interstate Commerce Commission ("ICC") to approve a railroad's acquisition of a competing barge carrier when it concludes, after a full hearing and on the basis of extensive evidence, that the transaction will not reduce competition on affected water routes or enable the merged carrier to increase rates or exclude competitors.

2. Whether the Court of Appeals correctly held that the ICC's factual findings and legal conclusions relating to the competitive effects of a proposed rail-barge consolidation were consistent with the Panama Canal Act and supported by substantial evidence.

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BRIEF FOR RESPONDENTS CSX CORPORATION AND AMERICAN COMMERCIAL LINES, INC. IN OPPOSITION

CSX Corporation ("CSX") and American Commercial Lines, Inc. ("ACL") oppose the petition of Crounse Corporation, *et al.* (in No. 85-2133) and the cross-petition of Patrick W. Simmons (in No. 86-134) for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

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[1] In accordance with Rule 28.1 of the Rules of this Court, the subsidiaries and affiliates of CSX and ACL are set forth at page 1a of the Appendix hereto.

STATEMENT

A. The Panama Canal Act

The Panama Canal Act of 1912, Ch. 390, 37 Stat. 560, 566 (1912) (presently codified at 49 U.S.C. § 11321 and referred to hereinafter as the "Act") imposes certain restrictions on railroad ownership of water carriers. Section 11321(a) provides generally that a railroad may not own an interest in or control a "water common carrier" with which the railroad "does or may compete for traffic." Section 11321(b), however, expressly authorizes the ICC to approve such a rail interest in a competing water carrier when it finds, after a full hearing, that the common ownership (1) "will still allow competition, without reduction, on the water route in question," and (2) will still allow the water carrier "to be operated in the public interest advantageously to interstate commerce."[2] The Act delegates to the ICC exclusive authority to decide "questions of fact related to competition."

B. Initial Proceedings

This case involves CSX's acquisition of ACL as part of CSX's acquisition in 1983 of Texas Gas Resources Corporation ("Texas Gas"), ACL's parent company. CSX is a holding company that operates a railroad system, while ACL controls American Commercial Barge Line Company ("ACBL"), a certificated barge carrier. Because the transaction would bring under common control a railroad and a water carrier, it required an ICC determination under the Panama Canal Act.[3]

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[2] The ICC does not have authority under Section 11321(b) to approve a railroad's interest in a competing water carrier if it provides service through the Panama Canal. This absolute prohibition is not involved in the instant case.

[3] Because ACBL is an ICC-regulated water carrier, CSX's acquisition of ACL also required ICC approval under 49 U.S.C. § 11344(d). Under this provision the ICC is required to approve a transaction involving the merger, consolidation or control of at least two regu-

In order to prevent CSX from exercising control of ACL prior to ICC review of the consolidation, CSX and Texas Gas agreed to deposit the stock of ACL in an independent voting trust pursuant to ICC regulations. 49 C.F.R. § 1013. The ICC rejected a challenge brought by the Water Transport Association (a petitioner herein) to the voting trust arrangement.[4] In sustaining the ICC's voting trust decision, the D.C. Circuit examined at length the legislative history and purposes of the Act. The court rejected the claim that the Act embodies a strict prohibition of rail-barge combinations, and specifically held that "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." 715 F.2d at 590.

On November 4, 1983, CSX and ACL filed a joint application seeking ICC approval of the transaction. The ten-volume application presented detailed evidence demonstrating that the proposed CSX/ACL consolidation would offer many significant operating and marketing benefits and would have no adverse effects on competition. The case was assigned to an administrative law judge, who held lengthy evidentiary hearings on the application. In all, the proceeding generated an extensive 15,000-page record, including over 200 verified statements of witnesses, 5,800 transcript pages and hundreds of written comments and letters by interested parties. In the course of these proceedings, the CSX/ACL application attracted

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lated carriers (other than two class I railroads) unless the ICC finds that (1) "as a result of the transaction, there is likely to be a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States," and (2) "the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs."

[4] *Water Transport Association—Petition for a Declaratory Order*, 367 I.C.C. 559, *aff'd sub nom. Water Transport Association* v. *ICC*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

the support of over 260 private and public organizations (Pet. App. 63a-66a, 160a-162a). In addition, the proposed transaction was actively supported by the U.S. Department of Transportation.[5]

C. The ICC's Final Decision

The ICC unanimously approved the CSX/ACL consolidation in a decision served September 7, 1984 (Pet. App. 47a-210a). In a lengthy opinion, the ICC concluded that the transaction satisfied the requirements of the Act and of Section 11344(d) because it would result in no harm to, or reduction in, competition and would yield significant benefits to the shipping public.

1. *Section 11321(b): Competition.* The ICC first addressed the competition standard of the Panama Canal Act. The ICC found that, although CSX and ACL competed with one another sufficiently to bring the transaction within the provisions of Section 11321(a) (Pet. App. 91a-93a),[6] the consolidation of the two carriers would not violate the Act because, under Section 11321(b), the transaction would result in no reduction in competition "on the water route in question" (Pet. App. 93a-121a).

The ICC determined that the appropriate inquiry under the "competition, without reduction" standard in Sec-

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[5] The U.S. Department of Justice, which also participated in the ICC proceedings, took no position with respect to the merits of the specific CSX/ACL transaction but proposed in its written comments the framework ultimately adopted by the ICC for analyzing the competition issues under the Act (Pet. App. 70a).

[6] The ICC based its finding that CSX and ACL competed on the fact that the two carriers could physically serve a number of common points, and on evidence that the two carriers had competed head-to-head for several specific movements. The ICC found, however, that this competition between CSX and ACL was "modest," due to the significant cost advantage that bargelines (including ACL) enjoy over railroads for traffic originating or terminating within an area stretching from 25 to 200 miles inland from the navigable rivers (Pet. App. 102a).

tion 11321(b) was whether the CSX/ACL consolidation would impair competition by creating or enhancing opportunities for the merged entity to exercise market power, defined as the ability to raise rates above competitive levels or to exclude competitors (Pet. App. 86a-87a). The ICC concluded that this analytical approach, which was endorsed by the Department of Justice (Pet. App. 175a-177a), fully vindicated the policy of the Act, which was designed "to protect shippers from actions that result in non-competitive prices for transportation services, not to protect individual barge competitors" (Pet. App. 94a).[7]

Applying this analytical framework, the ICC decided to "focus" on barge transportation in assessing the potential competitive effects of the CSX/ACL consolidation (Pet. App. 89a). The ICC found that this focus was required by the Act, which instructs the ICC to examine the competitive effects of rail-barge combinations "on the water route in question," and was also supported by the evidence, which revealed that competition between railroads and barges was generally limited due to the higher cost structure of the railroads (Pet. App. 87a-88a).

Turning to an examination of the competitive structure of the inland waterways market served by ACL, the ICC concluded that "the record amply demonstrates that the barge industry today is highly competitive" (Pet. App. 94a). The ICC noted that "literally hundreds" of independent firms operate on the inland waterways served by ACL, and no single firm accounted for more than seven percent of the barge traffic (Pet. App. 94a, 97a). ACL accounted for a mere 6.54 percent of the tonnage carried by inland barge carriers in 1981 (Pet.

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[7] The ICC disavowed language in one of its earlier decisions which suggested that the preservation of competition in a particular market was synonymous with the preservation of the position of individual competitors within such markets (Pet. App. 80a-81a). *See Illinois Central Railroad Co.—Control—John I. Hay Co.*, 317 I.C.C. 39, 52 (1962).

App. 97a-98a). Based on these data and other measures of market concentration,[8] the ICC found that the barge industry was unconcentrated and "highly competitive" (Pet. App. 97a, 101a). In addition, the ICC found that the barge industry was characterized by ease of entry and exit, making potential competition an effective additional constraint on carrier action (Pet. App. 107a-115a). No carrier, including ACL, could exercise market power given the intensity of existing and potential competition.

The ICC concluded, moreover, that the CSX/ACL consolidation would not reduce this intense competition or enable the combined CSX/ACL to exercise market power by raising rates or excluding competitors. In its analysis, the ICC addressed the two ways in which opponents of the CSX/ACL consolidation claimed that the transaction could harm competition (Pet. App. 101a). First, opponents argued that, by eliminating ACL as an independent competitor of CSX, the merger could increase market concentration where the two carriers had previously competed. Second, opponents claimed that the consolidation might enable CSX/ACL to engage in predatory practices having the effect of eliminating other independent barge competitors, thereby permitting CSX/ACL to charge higher-than-competitive rates. The ICC fully examined each of these potential adverse effects and found that neither would occur.

First, the ICC found that the elimination of ACL as an independent competitor of CSX (the reduction by one in the large number of competitors) would not reduce competition (Pet. App. 102a-103a). Although CSX and

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[8] The ICC employed the Herfindahl-Hirschman Index, a measure of market concentration used by the Department of Justice to evaluate the potential competitive effects of corporate mergers. The ICC found that the Index for the barge industry was 172, far below the Justice Department's threshold of 1000 for mergers that pose even the possibility of anticompetitive effects (Pet. App. 99a).

ACL competed with one another to a limited extent, the ICC determined that the small increase in concentration resulting from their consolidation would not affect the vitality of competition because the transaction would "still leave hundreds of firms as active competitors," well above the number needed to preserve effective competition and preclude the exercise of market power (Pet. App. 103a).

Second, the ICC found that a combined CSX/ACL would not be able successfully to undertake predatory practices to eliminate independent barge competitors (Pet. App. 103a-120a). The ICC concluded that CSX/ACL would have neither the ability nor the incentive to divert CSX-originated rail traffic from independent barge carriers to ACL unless CSX/ACL could offer shippers better service and lower rates (Pet. App. 104a-105a, 116a-119a). The ICC noted that the transaction could result in some efficiency-related traffic diversions, but such diversions would be small and in any event would not impair the ability of independent bargelines to operate effectively (Pet. App. 117a-119a).[9] The ICC also found that the competitive nature of the barge industry would prevent CSX and ACL from successfully undertaking a strategy of predatory pricing (Pet. App. 106a-115a). The ICC explained that even if a combined CSX/ACL were to reduce its rates below competitive levels in an attempt to drive competitors out of business, it could never successfully raise its rates to monopoly levels and recoup its losses because independent bargelines would always be ready and able to enter the market and prevent rates from rising above competitive levels.[10] The ICC also

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[9] Thus, petitioners' statement that the ICC found that CSX/ACL would divert traffic from independent barge carriers is seriously misleading (Pet. 6). As the ICC made clear, such diversions could occur only if CSX/ACL were able to offer shippers better service and cheaper rates than its competitors—a result that is entirely pro-competitive and in the public interest (Pet. App. 119a).

[10] In this connection the ICC found that the inland barge industry was characterized by relative ease of entry and exit, low economies

examined and rejected claims that a merged CSX/ACL could successfully pursue various types of rate manipulation designed to eliminate barge competitors (Pet. App. 115a-119a, 190a).

In sum, the ICC made reasoned findings that the CSX/ACL consolidation would not result in any reduction in competition "on the water route in question," would not enable the merged system to exercise market power by raising rates above competitive levels and would not impair the ability of independent bargelines to compete.

2. *Section 11321(b): Public Advantage.* The ICC also concluded that the proposed CSX/ACL consolidation satisfied the "public advantage" standard of Section 11321(b) (Pet. App. 120a-121a). The ICC observed that this test was "closely related" to the competition standard because the preservation of effective barge competition, and the rate and service advantages that such competition fosters, further the public interest and promote interstate commerce. In any event, the ICC also found that the transaction would affirmatively benefit the shipping public by enabling the merged carrier to provide expanded single-system service to shippers, achieve cost savings and efficiencies and initiate innovative marketing strategies, all of which would be pro-competitive (Pet. App. 121a, 143a-145a).[11]

3. *Oversight and Reporting Conditions.* Even though the ICC expressed confidence that its "economic analyses . . . are accurate" (Pet. App. 120a), and that the trans-

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of scale and high mobility and substitutability of equipment—conditions which would render attempted predatory pricing and other anticompetitive practices futile (Pet. App. 107a-115a).

[11] The ICC also approved the proposed CSX/ACL consolidation under Section 11344(d). Citing the intense competition facing CSX and ACL both before and after their combination, the ICC concluded that the transaction would not substantially lessen competition, create a monopoly or restrain trade in freight surface transportation in any region of the United States (Pet. App. 122a-127a).

action would have no anticompetitive consequences, it took the extra precaution of imposing certain carefully tailored conditions, including reporting requirements and annual oversight hearings for five years, to permit the ICC to monitor the effects of the consolidation and to allow interested parties to present any evidence of possible anticompetitive effects (Pet. App. 120a, 145a-147a, 208a-210a). The ICC expressly retained jurisdiction "to take corrective action if adverse effects should materialize" (Pet. App. 120a).[12]

D. The Court of Appeals Decision

A divided court of appeals affirmed the ICC's decision (Pet. App. 1a-41a).[13] The court found that the ICC's approval of the CSX/ACL consolidation was based on a correct construction of the applicable statutes and fully supported by the record evidence.

Consistent with the decision of the D.C. Circuit in *Water Transport Association*, 715 F.2d 581, the court below rejected petitioners' claim that the Panama Canal Act embodies a "strict" prohibition of railroad ownership of barge carriers subject only to the "narrowest" of exceptions (Pet. App. 5a). Rather, the court held that the Act was intended to authorize the ICC to approve rail-barge common ownership when it finds that such ownership would not reduce competition (Pet. App. 6a-11a).

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[12] The ICC also imposed standard labor protection conditions in favor of CSX rail employees who might be adversely affected by the consolidation (Pet. App. 149a-151a). *See* 49 U.S.C. § 11347. Consistent with longstanding precedent, however, the ICC declined to extend such protection to employees of rail carriers not involved in the transaction (Pet. App. 149a-150a).

[13] The CSX/ACL consolidation was consummated on October 11, 1984, when another panel of the court of appeals, following briefing and oral argument, declined to issue a stay of the ICC's decision pending judicial review. *Crounse Corp.* v. *ICC*, No. 84-3743, *et al.* (6th Cir. October 11, 1984). Since that time ACL has been operated by CSX as a separate constituent unit of the CSX transportation network as authorized by the ICC's order.

The court of appeals also rejected petitioners' specific claims concerning the ICC's interpretation and application of the Act in the circumstances of this case. The court held that it was permissible for the ICC to analyze the effects of the CSX/ACL consolidation on competition on "the water route in question" by focusing on barge competition, and it found no merit to petitioners' contention that the elimination of competition *between* CSX and ACL—"rail-barge competition"—itself required disapproval of the application (Pet. App. 11a-13a). The court also rejected petitioners' argument that the ICC improperly construed the Act to require a showing that a proposed rail-barge consolidation would actually eliminate barge competitors before it would be found to run afoul of the Act; the court held instead that the Act requires a showing that a particular consolidation would result in an actual reduction in competition through the elimination of independent barge carriers, and not "simply harm to particular bargelines due to intensified competition" (Pet. App. 14a).[14]

Finally, the court of appeals denied petitioners' various challenges to the ICC's determinations of fact relating to the competitive effects of the CSX/ACL consolidation (Pet. App. 15a-21a). Exercising appropriate deference to the expert agency's resolution of conflicting evidence, the court held that the ICC's findings were "based on a reasoned and justifiable view of the evidence of record" (Pet. App. 21a).[15]

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[14] The court of appeals similarly upheld the ICC's approval of the transaction under Section 11344(d), and addressed several procedural issues (Pet. App. 22a-31a). In particular, the court sustained the ICC's decision not to impose labor protection conditions for the benefit of non-CSX rail employees, and held that Section 11344(d) does not require the ICC to consider the interests of such employees in approving the transaction (Pet. App. 24a-26a).

[15] Judge Timbers dissented from the court of appeals' decision. Although agreeing with the majority that the Act does not estab-

E. The Annual Oversight Proceeding

Pursuant to the oversight and reporting conditions imposed as part of its decision approving the CSX/ACL consolidation, the ICC recently completed its first formal proceeding to examine the competitive effects of the transaction and CSX/ACL's compliance with the Act. The ICC had invited interested members of the public to submit comments on these issues. On the basis of these submissions, which included dozens of comments by shippers supporting the services offered by CSX/ACL (and not a single shipper comment in opposition), the ICC recently issued a report unanimously finding that the CSX/ACL consolidation has not diminished competition but in fact "has increased beneficial competition by allowing CSX and ACL to introduce new intermodal price and service options." [16] The ICC therefore concluded that there was no need to reopen the CSX/ACL consolidation proceeding.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any other decision by this Court or any other court, and raises no substantial question of federal law. Accordingly, review by this Court is not warranted.

1. At issue in this case is the proper interpretation and application of the Panama Canal Act of 1912, which

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lish an absolute prohibition of railroad ownership of bargelines, Judge Timbers believed that the ICC had misapplied the Act in the particular context of the CSX/ACL transaction (Pet. App. 33a). In particular, Judge Timbers disagreed with the ICC's decision to focus its competitive analysis of the transaction on barge competition and, based on his own reweighing of the evidence and assessment of the record before the ICC, disagreed with the ICC's finding that the CSX/ACL consolidation would not reduce competition or result in the elimination of independent barge carriers.

[16] Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.*, at 2 (served August 29, 1986). A copy of the oversight decision has been lodged with the clerk of this Court.

imposes certain restrictions on rail-barge common ownership. Since its enactment, the Act has seldom been interpreted by any court. Indeed, during the past 60 years only one other court of appeals has construed this relatively obscure statute, and its decision arose out of an interlocutory proceeding involving the same transaction at issue in the instant case. *Water Transport Association*, 715 F.2d 581 (sustaining CSX/ACL voting trust against challenge based on Act). The decision below is fully consistent with this earlier decision, as the court of appeals noted (Pet. App. 10a).[17]

2. Review is also unwarranted because the decision below raises no substantial federal question warranting plenary review by this Court. Running throughout all of petitioners' arguments before this Court is the claim that the Panama Canal Act embodies a "strict" prohibition of railroad ownership of barge carriers, subject only to the narrowest of exceptions (Pet. 7, 13, 17). The court of appeals' rejection of this construction of the Act is demonstrably correct (Pet. App. 6a-11a). Congress in Section 11321(b) *specifically authorized* the ICC to allow railroads to own interests in water carriers with which they compete, if the ICC found that such interests pose no risks of the anticompetitive harms at which the Act was aimed. Thus, the plain language of the Act refutes petitioners' suggestion that the Act embodies a "strict" prohibition of rail-barge interests.[18] In *Water Transport As-*

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[17] The only other judicial decision that has interpreted the substantive provisions of the Act in the past six decades upheld an ICC decision authorizing railroad ownership of a barge carrier. *American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799 (D.D.C. 1974) (three-judge court), *aff'd sub nom. Water Transport Association* v. *United States*, 421 U.S. 1006 (1975) (per curiam).

[18] Moreover, the plain language of the Act also demonstrates that Congress knew how to impose a "strict" prohibition of rail-barge common ownership when it wanted to do so. As previously noted (note 2, *supra*), the Act establishes an absolute prohibition

sociation, 715 F.2d at 590, the D.C. Circuit, on the basis of a thorough review of the Act's history, held that "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." [19]

The court of appeals' holding that the Act authorizes the ICC to approve rail-barge acquisitions that will not harm or reduce competition is also supported by the purposes and history of the statute. As the court of appeals explained, the Act was passed in 1912 in response to concerns that some railroads were using their control of water carriers to drive out independent water carriers and divert traffic to their parallel rail lines, thereby depriving the public of the rate and service advantages of water transportation (Pet. App. 7a). Congress was particularly concerned with predatory pricing— the practice by which some railroads sought to eliminate competition from the then-embryonic and struggling barge industry by acquiring a competing water carrier, reducing its rates below cost in order to drive out independent water carriers, and then raising the rates of the railroad-owned water carrier to supracompetitive levels in order to protect traffic on the railroad's higher rated rail lines.[20]

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of railroad ownership of competing water carriers if (and only if) they provide service through the Panama Canal. For water carriers (such as ACL) that do *not* provide service through the Canal, Congress intended no such absolute ban on railroad ownership but instead expressly authorized the ICC to approve such joint rail-barge interests.

[19] Contrary to petitioners' suggestion (Pet. 21), the Transportation Act of 1940, Pub. L. No. 785, 54 Stat. 898 (1940), reaffirmed the limited scope of the Act's prohibition of rail-barge interests by amending the Act to make clear that the ICC has authority under Section 11321(b) to approve railroad acquisitions of competing water carriers and not simply authority to continue rail-barge interests that preceded the Act. *See* Pet. App. 10a; *Water Transport Association*, 715 F.2d at 589-90.

[20] As the court below noted, the history of the Act is "replete" with references to this practice (Pet. App. 7a). *See, e.g.*, H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912); 48 Cong. Rec. 6,591,

Petitioners suggest that the court of appeals erred in focusing on predatory pricing because some legislators in 1912 cited other types of predatory practices by railroads (Pet. 14). The relevant materials clearly show, however, that predatory pricing was Congress' dominant concern. In any event, petitioners' assertion misses the mark because the court of appeals' point was simply that the Act was aimed at specific anticompetitive practices and was not intended as a strict prohibition of all rail-barge interests.

The court of appeals' interpretation of the Act is further supported by the ICC's decisions applying the 1912 statute. Those decisions, as the court below observed (Pet. App. 9a-10a), have consistently given effect to Section 11321(b) and contradict the notion that the Act mandates strict separation of railroads and bargelines.[21]

Thus, the court of appeals in this case correctly held that the Panama Canal Act does not embody a strict prohibition of rail-barge common ownership, but instead authorizes the ICC to approve such common ownership

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6,715, 9,238, 10,283, 10,373, 10,461, 10,562, 10,575. *See also Water Transport Association*, 715 F.2d at 587, 596; *American Waterways Operators*, 386 F. Supp. at 803; *Lake Line Applications*, 33 I.C.C. 699, 718 (1915), *appeal dismissed sub nom. Lehigh Valley Railroad Co.* v. *United States*, 234 Fed. 682 (E.D. Pa. 1916), *aff'd*, 243 U.S. 412 (1917).

[21] Indeed, the ICC has exercised its authority under Section 11321(b) to approve rail interests in competing water carriers in at least 34 separate cases since 1912. These decisions are listed at pages 2a-4a of the appendix hereto. Many of these decisions involved railroad interests in substantial water carrier operations. *See, e.g., Application of Missouri Pacific Railroad Co.*, 245 I.C.C. 143 (1941) (water service between New Jersey and Texas); *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935) (water service between New Jersey and New Orleans); *Application of Southern Pacific Co.*, 32 I.C.C. 690 (1915) (water service between San Francisco and Panama). Although most of the cases involved railroad applications to continue their ownership of water carriers which pre-dated the Act, the standard applied by the ICC was the same as that applied to the CSX/ACL transaction (Pet. App. 79a).

when, on the facts before it, it concludes that no reduction in competition on affected water routes will result.[22] This holding, which is supported by the language, history and judicial interpretation of the Act, plainly does not warrant reexamination by this Court.

3. In addition to their broad but erroneous contention that the Panama Canal Act imposes a strict prohibition of railroad ownership of bargelines, petitioners allege that the ICC made inadequate findings in the specific factual context of the CSX/ACL consolidation and that the court of appeals erroneously sanctioned those findings. Petitioners' claims—which are wholly dependent upon the particular factual record in this case—raise no important or recurring question of federal law and, in any event, are without merit.

a. Contrary to petitioners' sweeping assertions that the ICC and court of appeals decisions approving the CSX/ACL consolidation will radically transform the structure of surface transportation competition (Pet. 9-11), the actual effects of the transaction and the decisions approving it have been and will be quite modest. The transaction involves a single railroad and a barge carrier which accounts for less than seven percent of the traffic carried on the affected water routes (Pet. App. 97a-98a).[23] The ICC found, and petitioners do not dispute, that the CSX/ACL consolidation will still leave "literally hundreds" of independent barge carriers providing competitive water transportation services on the inland waterways served by ACL (Pet. App. 94a). In

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[22] This interpretation does not, as petitioners suggest (Pet. 23), render the Act meaningless. The Act itself requires the ICC to consider rail-barge interests on a case-by-case basis, a flexibility which the court of appeals correctly noted was deliberate (Pet. App. 10a-11a).

[23] ACL's operating revenues in 1982 (the most recent year for which the ICC had financial data) were only $193.1 million (Pet. App. 206a), a relatively modest amount by United States industrial standards.

addition, the ICC found that potential competition from new entrants would further constrain the actions of CSX/ACL. Moreover, the ICC determined, after a thorough review of the evidence, that the CSX/ACL consolidation would not harm or reduce competition in any way and would not result in the elimination of competing barge carriers (Pet. App. 94a-120a). These factual findings are fully supported by the record, and the court of appeals therefore properly sustained them.[24]

b. Petitioners contend that the court of appeals erred by upholding the ICC's decision to "focus" (Pet. App. 89a) its competitive analysis of the CSX/ACL consolidation on the barge industry and on barge competition (Pet. 12-23). As the court of appeals explained in rejecting this claim, however, the plain language of the Act directs the ICC to consider whether the transaction will reduce competition "*on the water route in question*" (emphasis supplied), and "[b]arges, not trains, operate on water routes" (Pet. App. 11a-13a). The ICC's focus on barge competition in its evaluation of the competitive effects of the CSX/ACL consolidation also furthers the purposes of the Act. As explained above, Congress in 1912 was concerned with possible railroad domination of barge carriers and with the exploitation of railroad-owned vessels to drive independent water carriers out of business. *See* pages 13-14, *supra*; Pet. App. 13a; Pet. 15. Because the Act was thus clearly aimed at preserving *barge* competition, it was reasonable for the ICC to focus its competitive analysis of the CSX/ACL consolidation on the *barge* industry.

Moreover, the evidence and arguments presented to the ICC in this case also support the Commission's deci-

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[24] Stripped to its essentials, the opinion of the dissenting judge in this case represents a simple disagreement with the ICC's findings. The Act entrusts the determination of "facts relating to competition" to the ICC, however, not to reviewing courts.

sion to concentrate its competitive analysis under Section 11321(b) on barge competition.[25] No party, least of all petitioners, argued before the ICC that the CSX/ACL consolidation would have an adverse impact on railroads or impair the ability of independent rail carriers to compete. Instead, opponents of the transaction (including petitioners) alleged that the consolidation would reduce competition "on the water route in question" as a result of either (1) the elimination of ACL as an independent competitor of CSX or (2) the alleged ability of the combined CSX/ACL system to eliminate its independent barge competitors (*see* Pet. App. 187a-191a). The ICC carefully examined *both* of these claims and found that *neither* one had merit, given the intensity of existing and potential competition on the inland waterways (Pet. App. 101a-120a). The court of appeals therefore properly sustained the ICC's decision to "focus" on the barge industry, and petitioners' continued assertions that the ICC's findings are inadequate are entirely without merit.

c. With respect to the first theory raised by opponents of the CSX/ACL consolidation—that the transaction would reduce competition on "the water route in question" by eliminating competition *between* CSX and ACL (which petitioners characterize as "rail-barge competition")—petitioners claim that the ICC "ignored" the impact of the elimination of ACL as an independent competitor of CSX and that, had this impact been considered, the Act would have required disapproval of the CSX/ACL consolidation (Pet. 20). Petitioners' claim misstates the ICC and court of appeals decisions and rests on a misguided reading of the Act.

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[25] For example, the ICC determined that the relevant product market for purposes of competitive analysis was barge competition (Pet. App. 87a-90a). The court of appeals, noting that market definition is a factual question to which courts owe the agency "the greatest deference," sustained this finding (Pet. App. 16a-17a).

The ICC *did* consider the loss of competition *between* CSX and ACL as part of its examination of the impact of the CSX/ACL consolidation on barge competition. The ICC explained that because CSX and ACL competed with one another for some traffic, the transaction would necessarily eliminate this competition and reduce by one the number of competitors in the areas where CSX and ACL competed. The ICC concluded, however, that "the mere consolidation of ACL and CSX will not reduce the number of competitors sufficiently to create a reduction in competition on the water route in question" because hundreds of independent competitors would remain and prevent any exercise of market power by the merged CSX/ACL system (Pet. App. 102a-103a).[26]

Petitioners' claim that the ICC ignored rail-barge competition appears to rest on the proposition that the elimination of the direct competition between the two consolidating carriers itself required, as a matter of law, the disapproval of the merger under Section 11321(b) (Pet. 20). The ICC, however, correctly rejected this view of the statute, which it logically concluded would render Section 11321(b) "a nullity" (Pet. App. 188a).[27] If the elimination of competition *between* two consolidating carriers were sufficient to require a finding of a reduction of competition under Section 11321(b), then *no* rail-

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[26] Petitioners thus fundamentally misstate the ICC's decision when they assert that the ICC "does not at any point analyze the impact of the acquisition on competition between CSX and ACL" (Pet. 20).

[27] Petitioners' argument is based entirely on language from the ICC's 1962 decision in *John I. Hay Co.*, 317 I.C.C. 39 (Pet. 19-21). In rejecting petitioners' interpretation of the Act, however, the ICC expressly overruled its earlier decision to the extent that it suggested that a reduction in competition between the merging railroad and water carrier itself required disapproval of the transaction (Pet. App. 80a-81a). Apart from the language in the *John I. Hay Co.* decision cited by petitioners, no other ICC decision supports petitioners' radical interpretation of the Act.

barge consolidation could ever be approved under that section because all such transactions by definition involve two carriers that the ICC has found under Section 11321(a) to be direct competitors for traffic. Because *all* rail-barge mergers necessarily eliminate the direct competition formerly existing between those two carriers, petitioners' view of the Act would effectively nullify Section 11321(b), a result clearly contrary to Congress' express intent to authorize some rail-barge mergers.

The court of appeals, like the ICC, ruled that neither the degree of competition between CSX and ACL, nor the mere fact that the proposed transaction would eliminate this competition, was dispositive with respect to the approval of the consolidation under the provisions of Section 11321(b). The court observed that "[a] reduction in competition, even a significant one, between a railroad and a bargeline does not automatically portend a reduction in competition among the various bargelines" (Pet. App. 13a). Thus, consistent with the focus of the Act on preserving barge competition and not individual competitors (Pet. App. 80a-81a, 94a), the court of appeals reasonably held that what matters is not the reduction by one in the number of competitors but the *effect* of that reduction on barge competition. In this case, moreover, the ICC found that the elimination of ACL as an independent competitor of CSX would not reduce competition on the water route in question.

Petitioners nonetheless place heavy reliance on a footnote in the court of appeals' decision, which they read as a concession by the court that an examination of rail-barge competition between CSX and ACL would have required disapproval of the CSX/ACL consolidation (Pet. 20; Pet. App. 5a n.2). That reliance is misplaced. The court of appeals simply noted that the ICC could not plausibly have based its Section 11321(b) determination of no reduction in competition *solely* on a finding of "minimal" competition between CSX and ACL. As the

court recognized, however, the ICC did no such thing, but instead went on to examine in greater detail the *effect* of the transaction (and the elimination of competition between CSX and ACL) on barge competition.

Thus, there is no merit to petitioners' claim that the elimination of competition between CSX and ACL required disapproval of the consolidation under the Act. To the extent that petitioners' argument rests on the proposition that the loss of competition between any two merging carriers requires an adverse finding regardless of the effect on barge competition generally, petitioners' claim is based on a tortured reading of the Act properly rejected by the ICC and court of appeals. To the extent that petitioners are instead contesting the ICC's findings with respect to the effects on barge competition of the loss of competition between these carriers, CSX and ACL, their claim represents nothing more than a disagreement with the ICC's factual findings, which were upheld by the court of appeals. In either case, petitioners' claims do not warrant this Court's attention.

d. Petitioners also object to the ICC and court of appeals decisions with respect to the second theory advanced by opponents of the CSX/ACL consolidation—that the transaction would enable a merged CSX/ACL to engage in predatory and other anticompetitive practices designed to eliminate its independent barge competitors. Specifically, petitioners argue that the court of appeals erroneously interpreted the Panama Canal Act to allow the ICC to approve the CSX/ACL consolidation so long as it would not drive independent barge carriers out of the market (Pet. 24).

What petitioners ignore is that the Act was intended to preserve barge competition and not to insulate individual water carriers from the burden of competing with railroad-owned barges. The ICC and court of appeals therefore reasonably construed the Act to require dis-

approval of the rail-barge consolidation only when the transaction would result in actual harm to competition, and not when the transaction simply causes particular competitors to experience the routine discomforts associated with intensified competition (Pet. App. 14a). The ICC found in this case that the CSX/ACL consolidation would not injure competition and, in fact, would result in more efficient and competitive transportation services (Pet. App. 143a-145a). Petitioners' protectionist arguments, which merely seek to avoid such enhanced competition, are contrary to the fundamental purposes of the Act.

e. The ICC's decision to retain jurisdiction over the CSX/ACL consolidation and to conduct an annual review of the competitive effects of the transaction further demonstrates that review by this Court is not appropriate. The ICC recently completed its first annual oversight proceeding, and found no basis for doubting the validity of its original conclusions concerning the competitive effects of the consolidation. The ICC's continued monitoring of the instant transaction, as well as its review of any future rail-barge consolidations on a case-by-case basis as contemplated by the Act, eliminate any need for intervention by this Court.[28]

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[28] Denial of review also would not result in a "gap" in antitrust enforcement as petitioners contend (Pet. 17). The Department of Justice, which is responsible for enforcement of federal antitrust laws, participated in the ICC proceedings and proposed a methodology, adopted by the ICC, for assessing the competitive effects of the CSX/ACL consolidation (Pet. App. 70a). Moreover, the CSX/ACL consolidation is exempt from the antitrust laws because of the ICC's findings under Section 11344(d)—the interpretation and application of which petitioners have not challenged in this Court. *See* 49 U.S.C. § 11341(a).

CONCLUSION

The petition for a writ of certiorari in No. 85-2133 and the cross-petition for a writ of certiorari in No. 86-134 should be denied.[29]

Respectfully submitted,

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September 16, 1986

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[29] In No. 86-134, "Cross-Petitioner" Simmons seeks review of the court of appeals' decision upholding the ICC's failure to consider the impact of the CSX/ACL transaction on employees of non-CSX railroads. The short answer to Simmons' argument is that Section 11344(d), on which he bases his claim, contains *no* requirement that the ICC consider the impact of a carrier merger transaction on rail employees, much less employees of railroads not even involved in the transaction. *Cf.* 49 U.S.C. § 11344(b) (consideration of labor impact required in transactions involving merger of two or more class I railroads). Simmons relies on *ICC* v. *Railway Labor Association*, 315 U.S. 373 (1942), and *United States* v. *Lowden*, 308 U.S. 225 (1939), but neither case involved Section 11344(d) and neither involved consideration of the interests of employees not directly affected by the transaction. Accordingly, the issue raised in the cross-petition is utterly without merit.

APPENDICES

APPENDICES

APPENDIX A

STATEMENT REQUIRED BY RULE 28.1

Listed below are all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of CSX Corporation and American Commercial Lines, Inc.:

Allegheny and Western Railway Company
The Baltimore and Cumberland Valley Rail Road Extension Co.
The Baltimore and Ohio Railroad Company
The Baltimore and Philadelphia Railroad Company
The Cincinnati Inter-Terminal Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal and Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
Mid-Allegheny Corporation
New Gauley Coal Corporation
Richmond, Fredericksburg & Potomac Railroad Company
Richmond-Washington Company
Sea-Land Corporation *
The Winchester and Potomac Railroad Company

* CSX's stock interest in Sea-Land Corporation is presently held in an independent voting trust administered by Midlantic National Bank as trustee.

APPENDIX B

DECISIONS OF THE INTERSTATE COMMERCE COMMISSION APPROVING RAILROAD INTERESTS IN WATER CARRIERS PURSUANT TO 49 U.S.C. § 11321(b)

1. Finance Docket No. 30300, *CSX Corporation—Control—American Commercial Lines, Inc.* (served September 7, 1984), *aff'd sub nom. Crounse Corp.* v. *ICC*, 781 F.2d 1176 (6th Cir. 1986)

2. *Southern Railway Section 5(15) Application*, 342 I.C.C. 416 (1972), *aff'd sub nom. American Waterways Operators, Inc.* v. *United States*, 386 F. Supp. 799 (D.D.C. 1974) (three-judge court), *aff'd sub nom. Water Transport Association* v. *United States*, 421 U.S. 1006 (1975) (per curiam)

3. *Application of Missouri Pacific Railroad Co. and Texas & Pacific Railway Co.*, 245 I.C.C. 143 (1941)

4. *Application of Canadian Pacific Railway Co.*, 225 I.C.C. 81 (1937)

5. *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 206 I.C.C. 427 (1935)

6. *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935)

7. *Peninsular & Occidental Steamship Co.*, 204 I.C.C. 142 (1934)

8. *Application of Union Lumber Co., National Steamship Co., and California Western Railroad & Navigation Co.*, 157 I.C.C. 376 (1929)

9. *New York Harbor Water Facilities Applications*, 100 I.C.C. 383 (1925)

10. *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923)

11. *Steamer Lines on Long Island Sound*, 50 I.C.C. 634 (1918)

12. *Direct Navigation Co.*, 46 I.C.C. 378 (1917)

13. *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 43 I.C.C. 168 (1917)

14. *Steamer Lines from Norfolk to Baltimore, New York, and Richmond*, 41 I.C.C. 285 (1916)

15. *Central Vermont Boat Lines*, 40 I.C.C. 589 (1916)

16. *Boston & Maine Boat Lines*, 40 I.C.C. 565 (1916)

17. *Maine Central Boat Lines*, 40 I.C.C. 272 (1916)

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19. *The Boat "H. B. Plant"*, 37 I.C.C. 453 (1915)

20. *Peninsular & Occidental Steamship Co.*, 37 I.C.C. 432 (1915)

21. *Ocean Steamship Co.*, 37 I.C.C. 422 (1915)

22. *Southern Pacific Company's Ownership of Stock in Sacramento Transportation Co.*, 34 I.C.C. 648 (1915)

23. *Application of the Duluth, South Shore & Atlantic Railway Co., Grand Rapids & Indiana Railway Co., and the Michigan Central Railroad Co.*, 34 I.C.C. 229 (1915)

24. *Application of the Chicago & Erie Railroad Co.*, 34 I.C.C. 218 (1915)

25. *Southern Pacific Company's Steamboats on the Sacramento River*, 34 I.C.C. 174 (1915)

26. *Oregon-Washington Railroad & Navigation Company's Ownership of the San Francisco & Portland Steamship Co.*, 34 I.C.C. 165 (1915)

27. *Application of the Pere Marquette and Bessemer & Lake Erie Railroad Companies*, 34 I.C.C. 86 (1915)

28. *Application of the Ann Arbor Railroad Co.*, 34 I.C.C. 83 (1915)

29. *Application of Grand Trunk Western Railway Co.*, 34 I.C.C. 54 (1915)

30. *Application of the Buffalo, Rochester & Pittsburgh Railway Co.*, 34 I.C.C. 52 (1915)

31. *Application of the Grand Trunk Railway Co. of Canada*, 34 I.C.C. 49 (1915)

32. *Oregon-Washington Railway & Navigation Company's Ownership of Steamboats*, 33 I.C.C. 658 (1915)

33. *Lake Tahoe Railway & Transportation Company's Ownership of a Boat Line on Lake Tahoe*, 33 I.C.C. 426 (1915)

34. *Application of Southern Pacific Co. in Connection with Operation of the Pacific Mail Steamship Co.*, 32 I.C.C. 690 (1915)

(4) (3)

Nos. 85-2133 and 86-134

Supreme Court, U.S.
FILED
SEP 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

CROUNSE CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission properly authorized the acquisition by a railroad of a water carrier under the Panama Canal Act of 1912, as codified in 49 U.S.C. 11321.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2133

CROUNSE CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

No. 86-134

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 781 F.2d 1176. The decision of the Interstate Commerce Commission (Pet. App. 47a-210a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1986 (Pet. App. 42a). A petition for rehearing was denied on March 28, 1986 (Pet. App. 43a). The petition for a writ of certiorari in No. 85-2133 was filed on June 26, 1986 and the cross-petition in No. 86-134 was filed on July 28, 1986.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 11321 (a codification of former Section 5(15)-(17) of the Interstate Commerce Act (49 U.S.C. (1976 ed.)) and Section 11 of the Panama Canal Act (ch. 390, 37 Stat. 566)), a railroad may not acquire a competing water carrier unless the Interstate Commerce Commission (ICC) has authorized the transaction. The Commission may authorize such an acquisition if it finds that the transaction "will still allow that water common carrier * * * to be operated in the public interest advantageously to interstate commerce and * * * still allow competition, without reduction, on the water route in question" (49 U.S.C. 11321).

The present case arose when CSX Corporation (which owns several railroads) sought to acquire control of American Commercial Lines, Inc. (ACL) and its subsidiary, American Commercial Barge Lines, Inc., a water carrier (ACBL). In November 1983, CSX and ACL jointly filed an application (Pet. App. 51a) seeking Commission authorization of the ac-

[1] We will refer to petitioners in No. 85-2133 as "petitioners," and to the petitioner in No. 86-134 as "cross-petitioner" or "Simmons."

quisition under 49 U.S.C. (& Supp. II) 11321 and 11344.[2] The Companies asserted that the transaction would result in substantial public benefits (*e.g.*, reduced costs and other advantages of integrated operations), that it would allow intermodal services to be priced more efficiently, and that it would expand shippers' options, thereby generally enhancing the competitiveness of the market (Pet. App. 63a-64a).

After extensive public hearings, the Commission approved the application. The Commission concluded that the Act did not mandate total separation of rail and barge lines. Rather, the Commission ruled, the plain language of the statute and its legislative history confirmed "that Congress intended that these statutory limitations should be used only to prohibit those rail-water combinations which could be expected to have an adverse effect on competition" (Pet. App. 70a). In particular, the Commission concluded that it was not required to deny any application merely because an acquisition might have an adverse impact on one or more competing barge lines, so long as it could not find that the overall level of competition would not be reduced (*id.* at 80a-81a, 187a-188a).[3] "Harm to competitors does not imply harm to competition." *Id.* at 80a.

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[2] Section 11344 requires Commission approval whenever any carrier subject to the Commission's jurisdiction is acquired by another carrier subject to the Commission's jurisdiction.

[3] The Commission said it would no longer follow that part of its decision in *Illinois Cent. R.R.—Control—John I. Hay Co.* (*John Hay*), 317 I.C.C. 39 (1962), that might be read to prohibit an acquisition that adversely affects particular competitors without reducing competition (Pet. App. 80a-81a). The Commission stated that the now-rejected portion

Following the analysis in the Department of Justice Merger Guidelines, the Commission concluded that competition between rail transportation and water carriage is limited because rates and costs are significantly lower for barges than for railroads. For that reason, the Commission focused on water carrier transportation as the relevant product market, considering other modes of transportation when an impact on water rates was shown (Pet. App. 88a-89a). See *id.* at 127a-143a (effect of rail transportation on carriage of coal and agricultural commodities).

The Commission examined whether the proposed transaction would have the foreseeable effect of reducing competition in the barge industry. It first rejected the contention that the common ownership of CSX and ACBL would itself increase concentration to an anticompetitive level (Pet. App. 101a-102a). The barge market consists of hundreds of firms offering line-haul service in the relevant geographic market;[4] those firms can move easily from one part of the system to another and can move into the transportation of different commodities as opportunities for profit appear (*ibid.*). Next, the Commission re-

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of *John Hay* would effectively nullify the Commission's express power, under Section 11321(b), to approve rail acquisitions of water carriers (Pet. App. 80a-81a, 187a-188a).

[4] The Commission defined "the water route in question" as the Mississippi River System and the Gulf Intercoastal Waterway (Pet. App. 90a). Equipment is generally interchangeable throughout these areas and there is no physical barrier to movement throughout these inland waterway systems (*id.* at 195a-198a). Based on the extensive record before it (see *id.* at 94a-101a), the Commission found that the barge industry in the relevant geographic market was "highly competitive" and "not concentrated" (*id.* at 101a).

jected the contention that the transaction would enable CSX to engage in tactics that could allow it to raise its prices above competitive levels. The Commission found that several factors, including the shipper's ability to control the routing of traffic, the lack of economies of scale, and the ease of entry into the barge industry, were sufficient to prevent the post-transaction CSX from diverting from independent barge operators an amount of traffic that would harm competition (Pet. App. 103a-105a).

The Commission also found that the competitive nature of the barge industry would prevent CSX and ACBL from successfully undertaking a strategy of predatory pricing in an effort to drive out competition and achieve a monopoly (Pet. App. 106a). It found that the most significant deterrent to any attempt by CSX-ACBL to dominate the barge industry, or otherwise profit from predatory practices, is the ease of entry into the market, permitting new carriers to enter or re-enter and offer lower rates (*id.* at 107a-114a). It reviewed a substantial body of data indicating that a new entrant of relatively modest size could successfully compete for line-haul business in the geographic market (*id.* at 111a-112a). Thus, natural market forces would "effectively constrain[]" CSX "from successfully engaging in any activity that would reduce competition" (*id.* at 115a).[5] Moreover,

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[5] The Commission also specifically analyzed the effect of the transaction on competition in barge transportation of coal and agricultural commodities (Pet. App. 127-143a) and found that no adverse effect on competition in those markets would result (*id.* at 134a, 137a-140a, 143a).

Finally, the Commission acknowledged that its conclusion that the CSX-ACBL combination will not result in a reduction in competition was predictive in nature and decided to impose

because the applicants had demonstrated that ACBL would continue as an active competitor, the Commission found the transaction also satisfied the remaining requirement of Section 11321(b), that the acquisition "will still allow [that] water common carrier * * * 'to be operated in the public interest advantageously to interstate commerce'" (Pet. App. 120a-121a).[6]

3. The court of appeals affirmed (Pet. App. 1a-41a). The court, adopting the Commission's view, found that the Panama Canal Act was not "a strict prohibition against railroad ownership of bargelines

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extensive oversight and reporting conditions to permit it to monitor the approved transaction for anticompetitive consequences and take remedial action if warranted (Pet. App. 145a-147a, 208a-210a). On August 25, 1986, the Commission entered a decision in the oversight proceeding, in which it concluded that the record "fails to show that the consolidation has reduced competition on ACBL's water routes or elsewhere", and that "the record shows that the consolidation has increased beneficial competition by allowing CSX and ACL to introduce new intermodal price and service options." Finance Dkt. No. 30300 (Aug. 25, 1986), slip op. 2.

[6] The Commission also concluded (Pet. App. 122a-127a) that approval was appropriate under Section 11344(d), which provides, in pertinent part, that "the Commission shall approve * * * an application unless it finds that—(1) as a result of the transaction, there is likely to be substantial lessening of competition * * *." Section 11344(d) was added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228(b), 94 Stat. 1931, and provides a less stringent standard of approval for consolidations that do not involve two class I rail carriers. See H.R. Conf. Rep. 1430, 96th Cong., 2d Sess. 120 (1980); Pet. App. 81a-82a (discussing the appropriate factors for consideration when Section 11344(d) governs).

In addition, the Commission imposed statutorily-required labor protective conditions for the benefit of CSX railroad employees (Pet. App. 53a). Consistent with recent precedents, the Commission refused to extend this protection to include employees of other railroads (*id.* at 149a-150a).

* * * [but a statute] meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines" (*id.* at 6a-7a), *i.e.*, reduction of rates to eliminate barge competition and subsequent raising of rates after water competition has been eliminated (*id.* at 7a-11a). The Court also found that the Commission had correctly construed the Act "to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition" (*id.* at 14a).

In assessing the Commission's application of the Act, the court deferred to the Commission's factual findings and declined to reweigh the evidence. Since substantial evidence supported the Commission's definitions of the relevant product and geographic markets (Pet. App. 16a-17a) and its findings that predatory pricing would not succeed where there is well-financed competition in an industry with low barriers to entry (*id.* at 20a-21a), the court accepted the Commission's conclusion that water carrier competition would not be reduced by the merger (*id.* at 21a).

The court of appeals also affirmed the Commission's conclusion that protective conditions were not required for the benefit of non-CSX rail employees (Pet. App. 25a-26a). See note 6, *supra*.

Judge Timbers dissented. In his view, the direct competition between CSX and ACL (Pet. App. 34a-35a) should have triggered a different analysis and result under the Panama Canal Act.

ARGUMENT

The court of appeals correctly affirmed the interpretation of the Act by the agency charged with administering it and correctly concluded that the agency's findings were supported by substantial evidence.

These conclusions do not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 12-17) that the Act was "designed to prohibit * * * common ownership" of rail and water carriers (*id.* at 13). The court of appeals correctly and unanimously rejected that interpretation (Pet. App. 6a-10a, 33a), finding that "Congress intended only to end the specific anticompetitive practice which prompted it to act. Congress declined to go further and enact the strict prohibition * * * petitioners now ask us to read into the Act" (*id.* at 9a).

As the court of appeals noted, this conclusion was supported by the legislative history of the Panama Canal Act (Pet. App. 7a-8a); the statutory language (*id.* at 8a-9a); early Commission decisions (*id.* at 9a-10a); and the reenactment of the statute in the Transportation Act of 1940 ("[T]he debates reveal some sentiment for * * * rail-barge separation * * * but that sentiment did not find its way into the statute as []enacted" (Pet. App. 10a)).[7] In addition,

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[7] Petitioners' argument (Pet. 21-23) that the 1940 legislation undercuts the ICC's interpretation is incorrect. The Transportation Act of 1940 amended the Panama Canal Act by giving the Commission specific authority to authorize "acquisitions" of water carriers. See former Section 5(17); *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590 (D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (*WTA*). This was done, according to the Conference Report, to "make[] more certain the authority of the Commission, in connection with which there ha[d] apparently been [some] doubt, with respect to the installation of new service." H.R. Conf. Rep. 2832, 76th Cong., 3d Sess. 69 (1940). See *WTA*, 715 F.2d at 589 n.20; Pet. App. 10a (emphasis in original) ("a change [of] wording intended to clarify that the [exemption would]

the court commented (*ibid.*) that its ruling was in accord with the decision of "the only court to consider the question since the 1940 reenactment" (see *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590

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be applied not only to applications for *continuing* joint operation, but also to application[s] for *new* joint operation[]"). Thus, the 1940 legislation was intended to make it clear that the Commission did have power to authorize rail-barge combinations, the antithesis of petitioners' contention.

Petitioners also err in attributing to the Commission (Pet. 22) the longstanding view that the Act "prohibited railroads from owning water carriers in competition with rail routes." That had never been the Commission's interpretation of the Act.

The court of appeals traced Commission decisions back to 1915 (Pet. App. 9a-10a). It noted that in *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 700 (1915), the Commission relied on public interest grounds to deny continued rail-water ownership rather than on "a perceived strict mandate of rail-barge separation" (Pet. App. 9a). Indeed, in *Ocean Steamship Co.*, 37 I.C.C. 422 (1915), the Commission permitted a railroad to continue its ownership of a steamship line with which it competed (see Pet. App. 9a-10a). See *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923) (Commission approved railroad's ownership of a new competing water service); *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935) (approving two railroads' ownership of a new water carrier that competed with the railroads).

In *WTA*, which also arose out of the CSX-ACL transaction (see note 8, *infra*), the District of Columbia Circuit also reviewed the history of the ICC's interpretation of the Act and rejected petitioners' wooden view that the statute requires absolute separation of rail and barge ownership (*WTA*, 715 F.2d at 588). As the court concluded in *WTA* (*ibid.*), petitioners' interpretation is erroneous in light of Congress's endorsement of the Commission's position, and expansion of Commission authority, in the 1940 legislation.

(D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984).[8] Had Congress intended to create an absolute bar to rail acquisition of barge lines it knew how to do so; it certainly would not have created a mechanism for Commission approval if all such transactions were prohibited (see Pet. App. 11a).

The court of appeals also correctly rejected petitioner's contention (Pet. 12-16) that the Commission was required to disapprove the transaction if there would be *any* reduction of rail-barge competition (as distinct from barge-barge competition). Petitioners argued that since the merger would obviously eliminate competition between CSX and ACBL, there would necessarily be a "reduction in competition under the Act," precluding Commission approval (Pet. App. 11a). But, as the court of appeals recognized, the Act refers only to reductions in competition "on the water route in question," and a reduction in rail-barge competition is relevant only insofar as it affects competition on the water route. As the court discerned, petitioners' contention is just another way of stating their erroneous position that the Act bars all mergers between competing rail and barge lines. The Act requires Commission approval only of mergers between *competing* rail and barge lines, and provides for such approval if there is no reduction of competition on the water route. Petitioners' theory would preclude approval of any merger of formerly competing rail and barge lines and would thus read

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[8] *WTA* arose from the same transaction that is at issue here. When the acquisition was first proposed, CSX and ACL sought to place the stock of ACBL in an independent voting trust pending Commission approval of the acquisition. The District of Columbia Circuit upheld the Commission's determination that the voting trust arrangement was permissible.

the approval mechanism out of the statute (Section 11321(b)). See *Texas Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself").[9]

There is no merit to petitioners' converse contention that the Commission and the court erroneously disregarded rail-barge competition altogether. As the court recognized, the Commission considered rail-barge competition "to the extent that [such competition] effectively disciplined barge rates on the routes in question" (Pet. App. 16a, 87a-88a). Competition from rail transportation was specifically discussed in assessing the effects of the proposed transaction on separate commodity markets, such as coal (*id.* at 127a-134a) and agricultural commodities (*id.* at 134a-143a). The court correctly held (Pet. App. 21a) that in light of the Commission's finding, supported by substantial evidence, that rail-barge competition in the relevant area was limited (*id.* at 88a), the consideration given to such competition was ample to satisfy the statutory standard.[10]

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[9] Similarly, there is no merit to petitioners' contention (Pet. 24) that the decision below would permit the Commission to approve any merger so long as barge competition was not totally eliminated. Neither the court nor the Commission adopted the "destruction" of competition standard petitioners envision. Rather, as the court stated (Pet. App. 14a): "In the instant case, the Commission construed the Act to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition."

[10] While petitioners challenge language in the court's opinion that, they contend, would eliminate any examination of rail-barge competition, it is clear that the court did not dispense with such competitive analysis. Moreover, the Commission expressly addressed rail-barge competition when, on the facts in this case, such an inquiry was warranted. As

2. Petitioners' other principal argument is that this particular transaction should not have been approved. That is essentially a fact-based contention, and there is no reason for this Court to reweigh the evidence underlying the factual findings on which the Commission and the court below concurred.

The essence of this contention appears to be that the Commission and the court paid too little attention to effects on particular barge competitors. But the court understood Congress's purpose: to be sure that shippers would continue to have a "genuine [barge] alternative to rail [service]" (Pet. App. 7a). The Act's concern, and the Commission's, was to preserve competition—not, as petitioners were demanding, to preserve the position of every existing barge line. The court correctly concurred (*id.* at 19a): "[H]arm to competitors [need not] translate into harm to competition * * *. That some competitors may suffer a reduction in traffic does not mean that the competition which benefits shippers will be diminished to any degree."

3. Petitioners' final contention (Pet. 23) is that approval of the CSX-ACL acquisition "effectively repealed" the Act. But, as the court of appeals recognized, the Commission did nothing of the sort: "[t]he Act remains in full force and the Commission, of course, will continue to analyze acquisitions under the Act on a case-by-case basis" (Pet. App. 11a). Should an acquisition be proposed where the likely

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a result, even if petitioners' objection to the language in the opinion below were well-founded it would not alter the judgment. And, to the extent that petitioners contend that greater emphasis should have been given to rail-barge competition, that is a factual question—within the Commission's area of expertise—that does not warrant this Court's consideration.

effect is reduction of competition on the water route, the Commission retains its full statutory power to act.

As the Commission and the court recognized, the economics of the transportation industry are far different today from what they were in 1912. This Court has indicated that the Commission is to exercise "flexibility and adaptability to changing needs and patterns of transportation." *American Trucking Associations* v. *Atchison T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Rail-barge mergers that might have reduced competition on the water route 70 years ago will not necessarily create anticompetitive results today. The Commission's decision in this case discharged its statutory duty in a way that responsibly accommodates federal authority to present economic conditions.[11]

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[11] The questions presented in the cross-petition are insubstantial. We note first that, contrary to cross-petitioner's assertion (Cross-Pet. 6), Rule 20.5 of the Rules of the Supreme Court precludes consideration of the cross-petition if the petition in No. 85-2133 is denied. With respect to the merits of the cross-petition, Simmons appears to be contending that the Commission is not foreclosed from considering the interest of non-CSX employees. But the court of appeals did not rule that such employees "cannot be considered" (Cross-Pet. 10). It ruled on, and rejected, cross-petitioner's argument, based on *Detroit, Toledo & Ironton R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984), that Section 11344(b)(1)(D) applied and, accordingly, that the Commission was *required* to consider the interests of employees of nonparticipating railroads (Pet. App. 24a-25a). Since Simmons now concedes that Section 11344(b)(1)(D) does not apply (Cross-Pet. 11-12), there is no intracircuit conflict within the Sixth Circuit. Even if such a conflict existed, it would be a matter for the court of appeals to resolve. Cross-petitioner's second contention (*id.* at 12-14)—based on a hypothetical case involving two class I rail carriers—is even less deserving of review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 40000